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No. 80-2152

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the City of St. Louis had failed to dismantle its dual school system as of 1977.

2. Whether, as a matter of law, there was adequate basis for the courts below to hold the State of Missouri liable for the continuation of a dual school system in St. Louis.

3. Whether the district court had the power, based upon its finding of an intra-district violation, to order the parties to seek voluntary participation of suburban school districts in a program of voluntary pupil transfers.

4. Whether the petitioners, having assented in May 1981 to a plan of pupil transfers between the St. Louis County Special School District (for special and vocational education) and the St. Louis City School District, should now be heard to challenge the district court's 1980 order to formulate such a pupil-transfer plan.

5. Whether the district court's June 1981 order, suspending operation of paragraph 12(c) of its May 1980 order, renders review of that paragraph premature.

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OPINIONS BELOW

The district court opinion of April 12, 1979, is reported at 469 F. Supp. 1304. The court of appeals opinion of March 3, 1980, is reported at 620 F.2d 1277. The order and opinion of the district court on remand (May 21 and June 3, 1980) are reported at 491 F.Supp. 351. The court of appeals opinion of February 13, 1981 (Pet. App. A), and the opinion of that court denying a stay pending the filing of a petition for certiorari (March 19, 1981) (Pet. App. B), are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1981 (Pet. App. A-6) and an order denying, *inter alia*, the Caldwell plaintiffs' petition for rehearing and denying the State parties'[1] request for a stay was entered on March 19, 1981 (Pet. App. A-30). The petition for a writ of certiorari was filed on June 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Proceedings Below[2]

(a) This school desegregation case was commenced on February 18, 1972, by a group of black children (hereinafter, the "Liddell group") against various officials of the St. Louis, Missouri, school district alleging that the defendants had maintained and perpetuated an unconstitutional dual school system. Pursuant to a stipulation of facts filed in June 1974, these parties entered into a consent decree on December 24, 1975, which was published for comment with notice to interested parties. Among those objecting to the consent decree were the NAACP and another group of black students and parents (the "Caldwell group") who also moved to intervene. That motion was denied; the Caldwell group appealed the denial, and the court of appeals

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[1] A complete listing of the parties appears in the petition on pages II-VI. The State of Missouri and all the state officials named as defendants, petitioners here, will be referred to as the "State parties" or "petitioners."

[2] The procedural history of this case through March 3, 1980, is set forth in detail in the court of appeals' opinion of that date (620 F.2d 1277).

reversed, *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976).[3] The court of appeals also suggested (*id.* at 774) that on remand, the district court invite the United States and the Missouri State Board of Education to intervene, and that the court hear all objections to the proposed plan and receive suggested alternatives.

(b) The State Board did not move to intervene on remand. In May 1977, however, the Caldwell group and the St. Louis School Board moved to join, as defendants, the State of Missouri, the State Commissioner of Education, and the State Board of Education. The movants were supported by the United States which filed a memorandum as amicus curiae. The State parties filed a responsive paper admitting that they were proper parties under the Federal Rules, but denying responsibility for school segregation in St. Louis.[4] On July 13, 1977, the district court ordered the State parties joined. The same day, the court announced it would hold a full trial on the merits in order to determine the adequacy of the Liddell consent decree. See 469 F.Supp. at 1311. Subsequently the United States moved for and was granted leave to file a complaint in intervention (*ibid.*).[5]

(c) The State parties appeared at trial, and evidence was presented bearing upon the State's, as well as the St. Louis Board's, potential liability. The district court found (469 F. Supp. at 1313-1314)

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[3] This Court denied certiorari, 433 U.S. 914 (1977).

[4] The motions and relevant memoranda are being lodged with this Court.

[5] The white parents' groups, *i.e.*, the "Adams" and "Puleo" groups, as well as the City of St. Louis were also allowed to intervene at this stage.

that: (1) prior to 1954, the Missouri constitution provided for separate schools for black and white pupils; (2) this provision was implemented by a number of statutes that were repealed in 1955 and 1957; (3) The Missouri State Board of Education has always had constitutional and statutory authority to supervise instruction and "otherwise effectuate" the State's educational policies, (4) the State Board also distributes state aid to the districts, approves school bus routes, and passes on applications by school districts for federal aid. The court concluded, however, that no defendants were liable, because the St. Louis school system was unitary.

(d) On appeal, the court of appeals reversed. It held (620 F.2d at 1280-1288) that the "neighborhood school" policy adopted by the Board in 1954-1956 was not designed to, and in fact did not, disestablish the former statutorily required dual system. Policies pursued from 1956-1977, the court found, intensified and aggravated existing segregation (*id.* at 1288-1291). The defendants, therefore, had not fulfilled their constitutional duty; accordingly, the court remanded for remedial proceedings consistent with its opinion (*id.* at 1297). The court of appeals directed the district court to have the parties develop a plan for enlisting the voluntary cooperation of the suburban school districts of St. Louis County in programs of student transfers and exchanges (*id.* at 1296), and to apportion the costs of desegregation among the defendants (*id.* at 1295 n. 28).[6]

(e) On remand, the district court entered Supplemental Findings of Fact and Conclusions of Law (491 F. Supp. 351, 355-360). It held that the State

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[6] Only the Adams group petitioned for a writ of certiorari, No. 79-1752, which was denied on October 6, 1980.

of Missouri, which had previously required segregated schools, had an affirmative obligation "to obliterate all vestiges of such state-imposed segregation" (*id.* at 359). Having failed to fulfill that obligation, the State parties "[stood] before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty" (*ibid.*).

On May 21, 1980, the district court adopted an intra-district desegregation plan for St. Louis (491 F. Supp. 351). It ordered the State to pay half the cost of desegregation (*id.* at 353). In addition, paragraph 12 of the order directed the State parties, the United States, and the St. Louis Board of Education to develop: (a) a voluntary, cooperative plan of pupil exchanges between St. Louis and the county school districts; (b) a plan for consolidating the vocational programs operated by the city and the county Special School District; and (c) a study and plan for eventual eradication of any vestiges of state-imposed inter-district segregation (*ibid.*).[7]

(f) Several parties, including the State parties, appealed from the district court's remedial order of May 21, 1980.[8] While that appeal was pending, the district court granted a motion by the Caldwell group to add the Special School District as a party. In January 1981, with the second appeal still pending, the St. Louis Board and the Caldwell group also

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[7] The complete text of paragraphs 12(a) through 12(c), as amended by subsequent orders of the district court, appears at Pet. App. A-35 through A-39. The amending orders of September 17 and December 19, 1980, appear as Pet. Apps. C and D.

[8] On May 23 and June 24, 1980, the Caldwell group moved for leave to file an amended complaint, and to add additional state officials as defendants, to conform to the evidence in the case. These motions were granted on June 27, 1980.

moved to amend their complaints to join certain suburban school districts as additional defendants, to allege inter-district violations, and to request compulsory, as opposed to merely voluntary, inter-district relief. These motions have not been acted on to date.

2. The Court of Appeals Opinion

On February 13, 1981, the court of appeals affirmed the district court's May 21, 1980, order. The court held that it had, on the first appeal, reversed the district court's nonliability finding as to all the defendants, thereby requiring or, at least, permitting the district court to find the State responsible for St. Louis' dual system (Pet. App. A-22). With ample support in the record, the court held, it was correct for the district court to find on remand that the State parties were " 'primary constitutional wrongdoers' " (*id.* at A-23), and to order them to pay half the costs of desegregation (*ibid.*).

The court of appeals also held that the district court had the power to order all three sub-parts of paragraph 12, and did not abuse its discretion in doing so (Pet. App. A-15 to A-16). The court noted that sections (a) and (c) do not impose relief upon nonparty school districts. Section (a) requires the *defendant* districts—St. Louis and the State—to seek voluntary cooperation of nondefendant districts. Section (c) requires the *defendants* to determine what, if any, inter-district relief could lawfully be required of *them*. As for Section (b), any problem in ordering relief against the Special School District of St. Louis had been cured when it was joined as a party.

The State parties, on February 19, 1981, asked the court of appeals for a stay of its mandate or a stay of the enforcement of paragraph 12 (Pet. App.

A-33), but that motion was denied on March 19, 1981.[9] This Court also denied a stay on April 20, 1981.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State parties to this school desegregation case have been found jointly liable with local authorities for the maintenance of a dual school system, and have thus been ordered to help pay for the remedial programs. Although the St. Louis Board of Education has not challenged its liability, these petitioners contend that the court of appeals erred in the first instance in holding that St. Louis was conducting a dual system. Alternatively, they argue that they should not have been held responsible for the maintenance of that dual system, or that the relief ordered in paragraph 12 of the district court's remedial order was beyond the court's power.

None of the contentions raises an issue worthy of this Court's review. As a threshold matter, we note that during June and early July the district court has entered new orders under all three sections of paragraph 12. One order incorporates by reference a proposed consent decree under 12(b). A second places 12(c) into an inactive status indefinitely.[10]

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[9] It was called to the attention of the court of appeals that two orders amending paragraph 12 had been entered during the pendency of the appeal. The court of appeals noted those orders (Pet. App. A-35 to A-38) but said they made no changes material to the disposition of the appeal. The State parties had noticed a new appeal from those revising orders. That appeal, No. 81-1184, is now pending in the court of appeals.

[10] A third order entered on July 2, 1981, adopts a plan under 12(a). To the extent that petitioners wish to attack its express terms, they would have recourse to the court of appeals.

Petitioners' attack on the legal bases of their liability raises no substantial questions. St. Louis' schools were segregated pursuant to Missouri law. The state has been ordered to assist in remedying that constitutional violation. The decisions below were squarely governed by decisions of this Court. Accordingly, the petition should be denied.

ARGUMENT

1. The court of appeals applied the correct standards to the available data when it determined that St. Louis' school system was unconstitutionally segregated. It is undisputed that prior to 1954, Missouri law required that separate schools be maintained for black and white children. The court of appeals, reversing the district court, found that this pre-1954 dual system in St. Louis had never been dismantled despite adoption of a plan in 1954-1956 for "neighborhood" schools (620 F.2d at 1284-1287). As part of the basis for this finding, the court of appeals noted that the available data tend to show that the plan resulted (*id.* at 1284) "in most of the student population continuing to attend one-race or virtually one-race schools." In 1962, the first year after 1954 that the schools kept racial data, "all [28] of the formerly black elementary schools still in existence were all or virtually all black" (*id.* at 1285). Teacher assignments mirrored the race of the students both at the original all-black schools and at those that had become predominantly black in the interim (*ibid.*).

Petitioners now argue that these data furnished no basis for a presumption that the original all-black schools remained all black between 1954 and 1962, or that they were purposefully denominated "black" by the St. Louis school district. In so arguing, peti-

tioners ignore the established rule that it was their burden (and that of the other defendants) to rebut the presumption that one-race schools in a formerly *de jure* system are vestiges of that dual system. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971). That the authorities saw fit to assign only black teachers to the schools which had been all-black in 1954 (and which were all-black in 1962) tends to support the hypothesis that official design, not mere population movement, was responsible for the schools' racial identifiability. *Swann*, *supra*, 402 U.S. at 18. Petitioners' argument that population movements resegregated the schools that had been black in 1954 has no support in the record. Population movement at a time when schools were pervasively segregated may instead have added to the number of one-race schools. This Court, in *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 n.13 (1979), noted that, rather than rebutting the prima facie case, such evidence of population movement, in a context of systemwide school segregation, tends to show the reciprocal influences of segregated schools and segregated living patterns.

2. The State parties had notice at all times of the claims against them for maintenance of a dual system in St. Louis. Their contention that they were denied due process is therefore without merit. The State parties' liability, moreover, is firmly rooted in prior decisions of this Court and the lower courts.

(a) Petitioners' contention (Pet. 13) that until the Caldwell group amended its complaint, they "had no opportunity to defend in any meaningful manner because they had no notice of any particular allegations against them" is unsupported. The motions to have the State parties added as defendants, to-

gether with the supporting memoranda,[11] set forth the facts and legal bases for liability more thoroughly than notice pleading under Rule 8, Fed. R. Civ. P., would have demanded. Since June 1977, the parties have never changed their basic theory of State liability, which the district court adopted in May 1980,[12] and which the court of appeals affirmed in February 1981 (Pet. App. A). Considering that the State parties actively participated in every phase of this case since trial in 1977, including all remedial hearings, petitioners' claim to have been denied property without a prior hearing is without factual basis.[13]

After trial, the Caldwell plaintiffs amended their complaint to allege causes of action against the State parties. That step is permitted (though not required) by Rule 15(b), Fed. R. Civ. P., where issues not raised by the formal pleadings have been tried by consent of the parties.[14] The rule assumes that tri-

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[11] See Statement, *supra*, page 3.

[12] 491 F. Supp. at 359-360, summarized, *supra*, pages 4-5.

[13] In addition to their due process claim, petitioners contend that on the appeal decided March 3, 1980, the court of appeals did not really reverse the district court's finding of nonliability as to them (see Pet. 14-15). The relevance of that contention at this stage is unclear. On remand, the State parties had an opportunity to appear in the district court and argue or adduce evidence to show why they should not have to participate in the remedy. The district court made its additional findings including the finding that the State was a "constitutional wrongdoer" (491 F. Supp. at 355). On appeal, the court of appeals expressly affirmed this conclusion (Pet. App. A-22 to A-23).

[14] Rule 15(b) reads in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be

able allegations can be made and issues joined by means other than complaint and answer.

b. Decisions of this Court, and of the lower courts, squarely authorize the decision in the present case to hold the State liable, and to require it to pay part of the cost of desegregation. The petitioners here point to no authority for their position, and do not claim there is a split among the circuits on the issue of state liability.

State responsibility to disestablish dual systems dates back to *Brown* v. *Board of Education* (*Brown I*), 347 U.S. 483 (1954) and *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294 (1955), in which this Court imposed upon states operating legally-mandated dual systems the obligation to dismantle them "with all deliberate speed" (*Brown II*, *supra*, 349 U.S. at 301). This duty arises from the state's assumption of responsibility, pursuant to its own constitution, to offer universal public education. Cf. *Swann* v. *Charlotte-Mecklenburg*, *supra*. The existence of the duty does not depend upon the state's having taken affirmative steps to interfere with desegregation. *Evans* v. *Buchanan*, 447 F. Supp. 982, 1037-1039 (D. Del.), aff'd, 582 F.2d 750, 766-767 (3d Cir. 1978), cert. denied *sub nom. Delaware State Board of Education* v. *Evans*, 446 U.S. 923 (1980);[15] *United States* v. *Missouri*, 363 F. Supp.

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treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise those issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

[15] In an earlier stage of the Delaware desegregation case, a three-judge district court held that to the extent that any

739, 742, 747-748 (E.D. Mo. 1973), aff'd in pertinent part, 515 F.2d 1365 (8th Cir.), cert. denied, 423 U.S. 951 (1975); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), aff'd with modifications, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).[16]

It is not disputed that Missouri, pursuant to art. IX of its constitution, has undertaken to furnish universal public education to the state's children, and until 1954, required that this be done on a segregated basis. Nor is it in doubt that the State Board is empowered, by its constitution and statutes, to administer state aid to the districts, approve bus routes, supervise instruction, gather information, and "otherwise effectuate the educational policies of the State" (469 F. Supp. at 1314). The State parties also approve district applications for federal

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schools in the state are in violation of *Brown*, the State Board is *primarily* responsible (379 F. Supp. at 1222). The phase of the case cited above was the remedial phase, in which the State was ordered to pay for specific educational programs instituted ancillary to desegregation. In support of that order, the district court said (447 F. Supp. at 1038): "Having failed over time to fulfill its constitutional obligation to provide a nondiscriminatory system of education for the children of this state, the State must now share the cost necessary to remedy the wrongs it perpetuated."

[16] In a series of Michigan cases, the courts examined specific st e actions as part of the determination whether the state, having no statute mandating segregation, was implicated at all in purposeful discrimination. See *Oliver* v. *Kalamazoo Board of Education*, 368 F. Supp. 143, 163, 185-190 (W.D. Mich. 1973), aff'd, 508 F.2d 178, 186 (6th Cir. 1974), cert. denied *sub nom. Michigan State Board of Education* v. *Oliver*, 421 U.S. 963 (1975); *Bradley* v. *Milliken (Milliken I)*, 484 F.2d 215, 238-242 (6th Cir. 1973), rev'd on other grounds, 418 U.S. 717 (1974).

assistance, which is subject to nondiscrimination requirements. Compare *United States* v. *Texas*, *supra*. The petitioners do not claim to have done anything whatever to help, urge, or force the St. Louis school district to dismantle its dual system. We submit that the district court on remand clearly applied the correct legal standards to these facts. See 491 F. Supp. at 359-360.

This liability finding was also an adequate basis for requiring the State parties to share the cost of desegregation. In *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267 (1977), this Court sustained the lower court's decision to require the State of Michigan to pay half of certain costs of Detroit's school desegregation. In the process of explaining why the Eleventh Amendment did not bar this judgment, this Court pointed out that the State could be required to spend money to fulfill its own duty to correct its own past violations of Equal Protection. *Id.* at 289-290.

In general, where states have been ordered to pay part of the costs of desegregation, that order has been predicated, as it was in this case, on the states' abdication of their affirmative duty to disestablish the *de jure* system for which they bear responsibility—whether by statute, past action, or past purposeful inaction. *Milliken II*, *supra*, 433 U.S. at 289; *Evans* v. *Buchanan*, *supra*, 447 F. Supp. at 1037-1039; *United States* v. *Board of School Commissioners of Indianapolis*, 456 F. Supp. 183, 191-192 (S.D. Ind. 1978), aff'd in part, 637 F.2d 1101 (7th Cir. 1980), cert. denied, No. 80-129 (Oct. 6, 1980); see also *Oliver* v. *Kalamazoo Board of Education*, *supra*, 368 F. Supp. at 205, and *United States* v. *Texas*, *supra*, 321 F. Supp. at 1045, and 447 F.2d at 446-448 (costly remedial action required of Texas).

3. Petitioners contend that the district court had no power to order the parties (in paragraph 12(a) of its remedial order) to prepare a plan of voluntary inter-district student transfers. Petitioners rely (Pet. 21) on *Milliken I*, *supra*, but they apparently recognize (Pet. 21-22) that *Milliken I*, *supra*, merely prohibits the *imposition* of relief upon nonparty school districts that have not been found to have participated in the creation or maintenance of a dual system. The court can, however, order those who have been found liable to make efforts to *persuade* those nonparty districts to cooperate voluntarily. *Hills* v. *Gautreaux*, 425 U.S. 284 (1976).[17]

4. In Point IV of their petition, the State parties challenge the district court's power to order, as it did in paragraph 12(b) of its May 1980 decree, that the parties develop and submit a plan "for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis * * *." At the time this order was originally entered, the Special District of St. Louis County was not a party to this suit. Whatever issues might have been raised by that circumstance have since been put to rest.

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[17] Petitioners (Pet. 22) rely upon a footnote in this Court's opinion in *Hills* v. *Gautreaux*, *supra*, 425 U.S. at 298 n.13, for the proposition that even where the state is found liable, interdistrict relief is improper in school cases. The *Hills* footnote discussing *Milliken I*, *supra*, is inapposite. In *Milliken*, the issue was whether nonparty suburban districts could be *compelled* to participate in desegregation—either by the court directly, or indirectly by means of an order directed to the State. That question is not involved here, for nothing in the decree imposes compulsory participation in desegregation on any nonparty.

On May 21, 1981, six of eight groups of parties—including the Special School District, which was joined as a defendant in September 1980, and the petitioners here—signed a proposed consent decree incorporating a plan for pupil transfers between the vocational educational programs of the two districts; the court thereupon signed and entered that decree.[18] Concerned that the absence of some parties from the consent decree might create a problem in its enforcement (see Pet. App. A-71), the district court reentered the May 21, 1981, plan as an order of the court on June 11, 1981 (Pet. App. F).[19]

Having consented to entry of the very plan that has been ordered, petitioners should not now be heard to attack the legal basis for entry of *any* order involving the Special School District. In any event, the district court clearly had the power both to enter paragraph 12(b) of its May 1980 decree and to implement it by the order of June 11, 1981.

The St. Louis School Board and the State parties were both found liable for perpetuating *de jure* segregation in St. Louis schools. Both sets of parties can be required to undertake whatever relief is best calculated to correct the effects of that past discrimination so long as the relief does not intrude upon the rights of nonparty school districts. The Special School District is a party to this suit, and it has agreed to the pupil exchange plan.

5. Paragraph 12(c) of the court's May 1980 order as amended (Pet. App. A-31 to A-38) calls upon the parties to this suit to suggest a plan to eradicate

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[18] A copy of the consent decree is being lodged with this Court.

[19] At that time, the court also reissued some specific orders regarding funding for the plan (see, *e.g.*, Pet. App. A-75 to A-76).

"government-imposed" segregation. In the appeal decided February 13, 1981, the court of appeals held that the quoted language must be read to mean imposed by parties to the case, including the petitioners (Pet. App. A-15 to A-16). In other words, this paragraph requires the St. Louis and State parties to undertake an investigation of their own practices, report the results of that investigation, and to propose corrective action to the court. The order does not require any corrective action or mandatory participation of nonparty school districts in desegregation.

On June 23, 1981, moreover, the district court granted a motion to "Terminate Further Reporting Under Paragraph 12(c)." [20] The court's order makes it clear that it does not plan to consider the possibility of mandatory inter-district relief until the voluntary plan has had a chance to work. Accordingly, if any question remains as to the validity of paragraph 12(c), there is no need for this Court to resolve it at this time.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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AUGUST 1981

[20] This order is being lodged with this Court.

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